UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MILGARD MANUFACTURING, INC., a Washington corporation,

Plaintiff,

v.

LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts mutual insurance company,

Defendant.

CASE NO. C13-6024 BHS

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR RECONSIDERATION AND PARTIALLY VACATING AND AMENDING PREVIOUS ORDER

This matter comes before the Court on Plaintiff Milgard Manufacturing, Inc.'s ("Milgard") motion for reconsideration (Dkt. 267). The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On November 12, 2013, Milgard filed suit against Defendant Liberty Mutual Insurance Company ("Liberty") in Pierce County Superior Court. Dkt. 1. On November

27, 2013, Liberty removed the matter to this Court. *Id.* Milgard alleges that Liberty (1) breached its duty to indemnify Milgard, (2) acted in bad faith, and (3) violated the Washington Consumer Protection Act ("CPA") and Insurance Fair Conduct Act ("IFCA"). Dkt. 24 ¶¶ 12–30.

On May 27, 2015, the Court ruled on the parties' motions for summary judgment. Dkt. 265. Relevant to the instant motion, the Court determined that Milgard failed to show the existence of coverage under the Liberty Policy because Milgard did not offer evidence establishing first knowledge of property damage during the policy period. *Id.* at 15.

On June 10, 2015, Milgard moved for reconsideration of the Court's coverage ruling. Dkt. 267. On June 15, 2015, the Court requested a response from Liberty and set a briefing schedule. Dkt. 269. On June 30, 2015, Liberty responded. Dkt. 275. On July 6, 2015, Milgard replied. Dkt. 278.

II. DISCUSSION

Milgard asks the Court to reconsider its previous order on four grounds: (1) new evidence indicates that Liberty did not intend the deemer clause to require first knowledge of property damage during the policy period; (2) Milgard submitted evidence of first knowledge of property damage as to the underlying *Providence* claim; (3) Milgard raised questions of fact regarding estoppel as to the underlying *UC Irvine*, *Lavongsar*, and *Irvine v. Segue* claims; and (4) the underlying *Gonzalez*, *Irvine Apts.*, and

Tuscany Hills claims should be dismissed without prejudice because they remain active.[1] Dkt. 267 at 3–6. The Court will address each issue in turn.

A. Legal Standard

Motions for reconsideration are governed by Local Rule 7(h), which provides:

> Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

Local Rules, W.D. Wash. LCR 7(h)(1). Reconsideration should "be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). "Whether or not to grant reconsideration is committed to the sound discretion of the court." *Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003).

B. Deemer Clause Evidence

Milgard first argues that new evidence warrants reconsideration of the Court's ruling that the Liberty Policy requires first knowledge of property damage during the policy period. Dkt. 267 at 4. The Court disagrees. The Liberty Policy unambiguously incorporates the Illinois Policy's coverage provisions. *See* Dkt. 146, Declaration of Ray Cox ("Cox Dec."), Ex. 1 §§ I, II.B.4, IV. The Illinois Policy, in turn, plainly provides that there must be first knowledge of property damage within the policy period in order for coverage to be triggered. *See* Cox Dec., Ex. 7 § I.A.1.c. Because the policy language

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[1] Milgard also seeks clarification as to the Court's ruling on Milgard's bad faith claims. Dkt. 267 at 7. The Court provided clarification in its order requesting additional briefing. *See* Dkt. 269.

at issue is clear and unambiguous, the Court need not consider extrinsic evidence of the parties' intent. *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874 (1993), *opinion supplemented by* 123 Wn.2d 131 (1994). The Court denies Milgard's motion on this issue.

C. *Providence* Claim

Next, Milgard contends that the Court should reconsider its coverage ruling with regard to the underlying *Providence* claim because Milgard submitted evidence of first knowledge of property damage during the policy period. Dkt. 267 at 3. In response to Liberty's first summary judgment motion,[2] Milgard provided a service request that was produced in the underlying *Providence* litigation. Dkt. 130, Declaration of Matthew Segal ("Segal Dec."), Ex. 78. The service request includes homeowners Luis and Gauri Reyes' report of "moisture on drywall [at] the corner of the windows" and "water stains" in their unit, which is part of the *Providence* development. *Id.* at 8–9. The homeowners reported these issues on December 27, 2002. *Id.* at 8. The Liberty Policy had a term of December 31, 2001 to December 31, 2002. Cox Dec., Ex. 1 at 2. Milgard referenced this evidence in a footnote in its response to Liberty's second summary judgment motion. *See* Dkt. 148 at 20 n.22 ("Liberty has also been provided direct evidence of first notice of property damage in the Policy period in at least one claim. Dkt. No. 130-1.").

Liberty disputes the admissibility of this evidence. First, Liberty argues that Milgard has made no effort to authenticate the service request in this case. Dkt. 275 at 7.

[2] Liberty subsequently withdrew this motion. Dkt. 134.

Second, Liberty contends that the service request contains inadmissible hearsay to which no exception applies. *Id.*

The Court "can only consider admissible evidence in ruling on a motion for summary judgment." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). With regard to Liberty's authenticity argument, evidence must be authenticated to be admissible. *Id.* Documents produced by a party in discovery are deemed authentic when offered by the party-opponent. *See id.* at 777; *Maljack Prods., Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 889 n.12 (9th Cir. 1996). Liberty produced the service request during discovery in this case. *See* Dkt. 118, Declaration of Matthew Segal ¶ 83, Ex. 78. The service request has therefore been authenticated by production. As to Liberty's hearsay argument, out-of-court statements are not hearsay when offered to prove knowledge or notice. *See Stevens v. Moore Bus. Forms, Inc.*, 18 F3d 1443, 1449 (9th Cir. 1994); *Kunz v. Utah Power & Light Co.*, 913 F.2d 599, 605 (9th Cir. 1990); Fed. R. Evid. 801(c). Milgard submitted the service request to demonstrate first knowledge of property damage during the policy period. *See* Dkt. 148 at 20 n.22. The service request is therefore admissible.

Liberty also contends that Milgard did not argue that the service request created an issue of material fact in its response to Liberty's summary judgment motion. Dkt. 275 at 7. While Milgard could have brought more attention to this evidence initially, the Court agrees with Milgard that the service request raises a material question of fact as to first knowledge of property damage in the underlying *Providence* claim. As noted above, the service request includes a report of "moisture on drywall [at] the corner of the windows"

and "water stains" in a unit within the *Providence* development. Segal Dec., Ex. 78 at 8–9. The report is consistent with the property damage that "more likely than not" occurred during the Liberty Policy period. *See* Dkt. 150, Declaration of Robert Bombino, Ex. A at 23. The report was also made on December 27, 2002, which falls within the Liberty Policy period. Segal Dec., Ex. 78 at 8; Cox Dec., Ex. 1 at 2. Accordingly, the Court grants Milgard's motion on this issue and vacates its prior coverage ruling with respect to the *Providence* claim.

D. Estoppel

Milgard also argues that it raised questions of fact regarding estoppel as to three underlying claims—*UC Irvine*, *Lavongsar*, and *Irvine v. Segue*.[3] Dkt. 267 at 5–6. The Court did not address estoppel in its previous order. *See* Dkt. 265.

In the insurance context, estoppel "arises by operation of law, and rests upon acts, statements or conduct on the part of the insurer or its agents which lead or induce the insured, in justifiable reliance thereupon, to act or forbear to act to his prejudice." *Buchanan v. Switzerland Gen. Ins. Co.*, 76 Wn.2d 100, 108 (1969). Under Washington law, "it is the general rule that if an insurer denies liability under the policy for one reason, while having knowledge of other grounds for denying liability, it is estopped from later raising the other grounds in an attempt to escape liability, provided that the insured was prejudiced by the insurer's failure to initially raise the other grounds." *Bosko*

[3] To the extent that Milgard argues the doctrine of waiver applies, Milgard only set forth the elements of and argued estoppel in its response to Liberty's second summary judgment motion. *See* Dkt. 148 at 20. The Court therefore declines to consider the doctrine of wavier here. *See 389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

v. Pitts & Still, Inc., 75 Wn.2d 856, 864 (1969); *see also Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 521 (2012) ("A provision must be asserted as a basis for denying coverage, and during litigation insurers may be precluded from asserting new grounds for denying coverage."). "As a general matter . . . estoppel claims implicate factual issues which are not appropriate for resolution on a motion for summary judgment." *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1419 (W.D. Wash. 1990).

Milgard argues that Liberty should be estopped from relying on the deemer clause to deny coverage for the *UC Irvine*, *Lavongsar*, and *Irvine v. Segue* claims because Liberty did not invoke the deemer clause prior to the settlement of those claims. Dkt. 267 at 5–6. Milgard contends that Liberty's failure to invoke the deemer clause prior to settlement deprived Milgard of the opportunity to pursue evidence of first knowledge. Dkt. 279 at 6–7.

To support its argument, Milgard presents evidence establishing that Liberty did not specifically rely on the deemer clause and request proof of first knowledge until after the *UC Irvine*, *Lavongsar*, and *Irvine v. Segue* claims had already settled. *See* Segal Dec., Ex. 17 at 70–74, Exs. 51, 56, 62–64; Dkt. 280, Declaration of Matthew Segal, Ex. A ("Lyons Dep.") 143:15–144:15, 196:20–198:24, 199:3–201:10. With regard to prejudice, Milgard offers the declaration of Joseph Aguilar ("Aguilar"), an attorney who represented Milgard in the underlying *Irvine v. Segue*, *Providence*, and *Tuscany Hills* claims. Dkt. 282, Declaration of Joseph Aguilar ("Aguilar Dec.") ¶ 1. Aguilar states that "neither Milgard nor the other parties regularly develop evidence relevant to when

alleged damage is first noticed or reported." *Id.* ¶ 2. Aguilar further asserts that "had we known that evidence of first notice would be raised by [Liberty] as an express defense to coverage for these and other claims, we could have at least explored through discovery (formal or informal) whether any evidence could provide this type of information." *Id.*

On the current record, the Court finds that there is a material issue of fact as to whether Milgard was prejudiced by Liberty's late reliance on the deemer clause in the *UC Irvine*, *Lavongsar*, and *Irvine v. Segue* claims. Milgard has submitted evidence indicating that it did not have the opportunity to pursue evidence of first knowledge in the underlying litigation. *See* Aguilar Dec. ¶ 2. Although Aguilar represented Milgard in only one of the underlying claims at issue—*Irvene v. Segue*—he nevertheless states that Milgard does not regularly develop evidence of first knowledge in construction defect actions. *Id.* Whether Milgard suffered actual prejudice under these circumstances is an open question of fact that cannot be resolved at this time. Accordingly, the Court amends its previous order and denies Liberty's summary judgment motion (Dkt. 145) on the issue of estoppel with respect to the *UC Irvine*, *Lavongsar*, and *Irvine v. Segue* claims.

E. Active Claims

Finally, Milgard argues the Court should have dismissed three of Milgard's underlying claims—*Gonzalez*, *Irvine Apts.*, and *Tuscany Hills*—without prejudice. Dkt. 267 at 6; Dkt. 279 at 11. Milgard contends that these claims remain active and thus evidence of first knowledge of property damage during the policy period could come to light in the future. Dkt. 267 at 6. Because discovery in these three underlying claims is ongoing, the Court agrees that dismissal of these claims should be without prejudice. The

Court grants Milgard's motion on this issue and vacates its previous dismissal of the *Gonzalez*, *Irvine Apts.*, and *Tuscany Hills* claims.

III. ORDER

Therefore, it is hereby **ORDERED** that Milgard's motion for reconsideration (Dkt. 267) is **GRANTED in part** and **DENIED in part**. The Court's previous order (Dkt. 265) is **VACATED in part** and **AMENDED in part** as discussed herein.

Dated this 17th day of August, 2015.

BENJAMIN H. SETTLE
United States District Judge